United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 77-7111

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAUL KUCZO, *et al.*,
Plaintiffs-Appellees,

v.

WESTERN CONNECTICUT BROADCASTING CO., *et al.*,
Defendants-Appellants.

On Appeal From The United States District Court
For the District of Connecticut

BRIEF FOR AMICI CURIAE AMERICAN BROADCASTING COMPANIES, INC. CBS INC. NATIONAL ASSOCIATION OF BROADCASTERS NATIONAL BROADCASTING COMPANY, INC. PUBLIC BROADCASTING SERVICE RADIO TELEVISION NEWS DIRECTORS ASSOCIATION

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ISSUES PRESENTED FOR REVIEW

1. Are broadcasters engaged in "state action" when they edit material offered for broadcast?

2. Assuming, *arguendo*, the existence of state action, is the decision below consistent with the Supreme Court's decision in *Columbia Broadcasting System, Inc.* v. *Demo-*

cratic National Committee, 412 U.S. 94 (1973), which held that there is no First Amendment right of access to the medium free of broadcaster editorial control?

REFERENCE TO RULING

The decision of the United States District Court for the District of Connecticut is reported at 424 F. Supp. 1325 (J.A. 168).

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), providing:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presenta-

tion of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

STATEMENT OF THE CASE

This case presents two questions: whether editorial decisions of broadcasters are state action, and whether such decisions are subject to the constitutional limitations imposed on the government itself.

Plaintiffs Paul Kuczo, Jr. and John Nocerino were candidates in the 1969 election for mayor in Stamford, Connecticut. At that time defendant Western Connecticut Broadcasting Company ("Western Connecticut") was licensed by the Federal Communications Commission (the "Commission") to operate two radio stations in Stamford, WSTC and WSTC-FM. These stations sold advertising time to mayoralty candidates in the election. Throughout the course of both the primary and general election campaigns, the former general manager of WSTC and WSTC-FM (Julian Schwartz) required both plaintiffs to submit for advance review scripts of the political advertisements which they wished to have broadcast by the stations. Schwartz refused to accept certain material for broadcast by the candidates which he found to be in bad taste, and in his view objectionable. In editing these political advertisements, the station violated Section 315 (a) of the Communications Act.[1]

Section 315(a) is the so-called "equal opportunities" provision of the Communications Act, which is designed to ensure that competing political candidates are afforded equal opportunities for use of the broadcast media. It

[1] 47 U.S.C. § 315(a) (1970); *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 752 (1972) (J.A. 65).

provides, with certain exceptions, that if a broadcaster permits one candidate to "use" a broadcasting station—by allowing him to present campaign advertisements, for example—"he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." The section does not require that the broadcaster allow any candidate to use the station unless he has previously allowed such use by a competing candidate. However, when the broadcaster affords "equal opportunities" to a candidate pursuant to this section, the section provides that the "licensee shall have no power of censorship over the material broadcast." [2] Thus, in editing the political advertisements of plaintiffs Kuczo and Nocerino, Schwartz caused the licensee to violate Section 315(a). A violation of Section 315(a) is a criminal offense, and may subject a station to a monetary forfeiture by the Commission.[3] At the time, however, Schwartz was apparently unaware that his editing of political advertisements violated Section 315(a).[4]

The Commission has established procedures for the resolution of claims arising under Section 315(a) promptly, and before the occurrence of an election. In numerous cases the courts have acted to make available immediate review of Commission decisions interpreting Section 315(a), so that parties may be advised of their respective rights before the election occurs.[5] Nonetheless, plaintiffs

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[2] The Commission interprets Section 315(a) as barring any editing of political advertisements by a broadcast station, even if the station would not have been required by Section 315(a) to have made the time available. See, *e.g.*, *WANV, Inc.*, 58 F.C.C.2d 854 (1976).

[3] 47 U.S.C. § 503(b) 1970).

[4] *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 730, 732 (1972) (J.A. 134).

[5] See *Use of Broadcast Facilities By Candidates For Public Office*, 24 F.C.C.2d 832 (1970). The purpose of ensuring prompt action is to effectuate candidates' appearances required by Section 315(a)

Kuczo and Nocerino accepted the editing and did not complain to the Commission before the occurrence of the election. In the general election on November 4th of that year, both plaintiffs were defeated by a third candidate.[6]

Sometime after the election, plaintiffs complained to the Commission that the station had interfered with their right to present their advertisements free of broadcaster editorial control, apparently urging that the station had violated Section 315(a). On October 8, 1970, the Commission released an "Order to Show Cause and Notice of Apparent Liability", directing Western Connecticut to show cause why its stations' licenses in Stamford should not be revoked, and ordering "that in the event of a determination that the hearing record does not warrant revocation, it shall then be determined whether an order of forfeiture in the amount of $10,000 or some lesser amount should be issued." [7] A hearing was held before an Administrative Law Judge of the Commission,[8] who found that Western Connecticut had in fact violated Section 315(a) of the Communications Act.[9] While the Administrative

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prior to the election or, if Section 315(a) is inapplicable, to release broadcast stations from the necessity of presenting candidate appearances when they are not required. This is particularly important since the requirement that stations present multiple fringe party candidates in an "equal opportunities" situation may substantially inhibit broadcaster presentation of more significant candidates. See pp. 39-43, *infra*.

[6] The advertising materials presented by the third candidate were not edited. *Western Connecticut Broadcasting Co.*, 43 F.C.C. 2d 730, 735 (1972) (J.A. 137). The motivation for this was not political, however, but rather reflected confidence that the third candidate and his staff would conform their announcements to the station's standards of good taste. *Id.*

[7] See *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 752 (1972) (J.A. 65).

[8] At the time Administrative Law Judges were known as Hearing Examiners.

[9] *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 752 (1972) (J.A. 65).

Law Judge determined that Western Connecticut's licenses in Stamford should not be revoked, he determined that the station should forfeit the sum of $10,000, the maximum amount of forfeiture permissible under the statute.[10] The Administrative Law Judge emphasized, however, that the former station manager's motivation in editing the advertisements was not political, but rather an effort to preserve the station's "good image". On review, the Commission affirmed the Administrative Law Judge's decision with minor exceptions.[11]

On November 21, 1973, while the revocation proceeding was pending, an application for Western Connecticut's Stamford AM broadcast license was filed by Radio Stamford, Inc. The Commission ordered that a hearing be held to determine whether the Western Connecticut license should be renewed, or whether the license should be awarded to the competing applicant. The Commission specifically required that the station's violation of Section 315(a) be considered in making this determination.[12] After an extensive hearing, on January 6, 1977, an Administrative Law Judge determined that the license for WSTC should be awarded to the competing applicant, relying in part on Western Connecticut's violations of Section 315(a).[13]

The decision of the Administrative Law Judge is presently being reviewed by the Commission.

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[10] 47 U.S.C. § 503(b), (c) (1970).

[11] *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 730 (1973) (J.A. 132).

Certain other issues of the stations' performances were made a part of this proceeding which are not relevant to the Section 315(a) violation.

[12] *Memorandum Opinion and Order*, 44 F.C.C.2d 673 (1973).

[13] *Western Connecticut Broadcasting Co.*, FCC 77D-3 (Init. Dec., January 14, 1977), at 96.

On October 19, 1972, plaintiffs brought this suit in the United States District Court for the District of Connecticut, against Western Connecticut, its president Kingsley Gillespie, and its former general manager, Julian Schwartz, seeking damages of $100,000 plus punitive damages against defendants for "censoring" the content of their political advertisements, and alleging violations of the First and Fourteenth Amendments.[14] (J.A. 6).

On September 23, 1976, defendants moved for summary judgment on the ground that the activity of the station and its employees was not state action in violation of the First Amendment. (J.A. 13, 154). Plaintiffs submitted only a two-page argument in opposition, contending primarily that the issues presented were ones of fact, not law, and hence inappropriate for disposition on a motion for summary judgment. (J.A. 158).

Without hearing oral argument, the court, Judge Edward Lumbard (sitting by designation), denied defendants' motion on December 20, 1976, finding that defendants had violated the First Amendment.[15]

The court stated initially that in order to find state action, there must exist a "sufficiently close nexus between the state and the challenged action" in order to subject that action to constitutional constraints.[16] In this regard, the court found that governmental regulation gave WSTC and WSTC-FM "monopoly control over the local airways." [17] Therefore, the court reasoned, since

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[14] Plaintiffs also relied on Civil Rights Act of 1871, 42 U.S.C. § 1985 (1970).

[15] *Kuczo* v. *Western Connecticut Broadcasting Co.*, 424 F.Supp. 1325 (D. Conn. 1976) (J.A. 168).

[16] *Id.* at 1327 (J.A. 170).

[17] *Id.*

the station was the primary carrier of information in the community, "federal regulation has invested Western [the licensee] with the capacity to obstruct free speech in local elections." [18]

Having found that the licensee was given the opportunity by the government to engage in effective "censorship", the court held that the action of the broadcaster was the equivalent of state action, citing the Supreme Court's decision in *Marsh* v. *Alabama*, 326 U.S. 501 (1946). The court found that state action was present even though the editing of the political advertisements was specifically prohibited by Section 315(a) of the Communications Act, and even though the Commission had previously held that Western Connecticut had violated the law.[19]

The court indicated, however, that its decision did not necessarily suggest that all broadcaster action would be held state action. It stated that:

> "Oligopoly rather than monopoly radio stations, programming of a different character or addressed to different audiences, and situations where the free speech rights of the broadcaster are also involved may present more subtle issues than those obtaining in the present case." [20]

The court did not elaborate its reasoning as to why a different result might be reached in these other factual contexts. The court did not distinguish, or even cite,

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[18] *Id.* Although the licensee was the only one licensed in Stamford, that city is served by stations in many other nearby cities. In her renewal proceeding decision, the Administrative Law Judge noted that some 20 AM and 27 FM stations provide service to the Stamford area. *Western Connecticut Broadcasting Co.*, FCC 77D-3 (Init. Dec., January 14, 1977), ¶¶ 40-41.

[19] 424 F.Supp. at 1327-28 (J.A. 171-72).

[20] *Id.* at 1328 n.3 (J.A. 174).

the various decisions of other federal courts holding that the action of private broadcasters in making editorial decisions is not the equivalent of state action.[21]

Having determined that the action of Western Connecticut was state action, the court without further analysis concluded that the First Amendment had been violated,[22] stating that "censorship by these stations has the same effect on free speech as would a Stamford local ordinance that censored political broadcasts over local radio stations." [23]

Although the court was evidently aware of the Supreme Court's decision in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) (*"CBS* v. *DNC"*),[24] the court did not consider the effect of that decision on the First Amendment issue. In that case the Supreme Court held that, even assuming that broadcaster action is state action, no violation of the First Amendment occurs when a broadcaster exercises editorial control over the material offered to him for presentation.

Finally, having found that Western Connecticut had violated plaintiffs' First Amendment rights, the court held under the doctrine established by the Supreme Court in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), that plaintiffs would be entitled to col-

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[21] See pp. 28-30 *infra*.

[22] 424 F.Supp. at 1326 (J.A. 169). The court stated that defendants concede "as they must, that the censorship was contrary to first amendment standards." We note, however, that the record shows that defendants conceded only that Section 315(a) had been violated.

[23] *Id.* at 1327 (J.A. 170).

[24] *Id.*

lect damages from defendants, thus extending the rationale of *Bivens* to instances where the First Amendment, rather than the Fourth, had been violated.[25]

On January 17, 1977, the court certified the issue of whether broadcaster action in this case was "federal action subject to the First Amendment" as a "controlling question of law," under 28 U.S.C. § 1292(b) (J.A. 183). This Court granted defendants' motion for interlocutory appeal on February 24, 1977. The court below did not certify the issue of damage liability.[26]

ARGUMENT

Introduction

We believe that the decision of the court below, holding that certain broadcaster editorial activity violates the First Amendment, creates a serious risk of First Amendment liability for the exercise of all broadcast editorial functions.[27]

Both in finding broadcaster action to be state action, and in holding that editing the political advertisements

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[25] *Id.* at 1328-29 (J.A. 172). The court also found that plaintiffs had failed to state a cause of action under the Civil Rights Act because there was no showing of action taken "under color of state law," and because there was no proof that the licensee's action was undertaken with any "discriminatory animus." *Id.* at 1328 (J.A. 172).

[26] Even when there is a First Amendment violation by a private party, we believe that an award of damages for such a violation is inappropriate. See note 102 *infra*.

[27] We take no position on this appeal as to whether the prohibitions of Section 315(a) are constitutional. But we note that substantial doubts about the constitutionality of that provision may be raised by the Supreme Court's recent decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

constitutes a violation of the First Amendment, the decision of the court below substantially undermines the ability of broadcasters to operate freely to promote the constitutional value in the "uninhibited, robust, and wide-open" [28] presentation of speech and expression. In holding that broadcaster action is state action, the decision fails to recognize the important value in broadcaster freedom. The decision raises the specter of a wide range of broadcaster decisions being challenged on constitutional grounds in the courts, with the attendant burdens of litigation and the inevitable risks that the editorial choices made will be found to be improper because a court disagrees with the particular choice, and substitutes its decision for that of the broadcaster.[29]

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[28] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

[29] See, *e.g.*, *CBS* v. *DNC*, 412 U.S. at 124-25: "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression." See also *Id.* at 167 n.17 (Douglas, J., concurring) ("[I]t was precisely the mistrust of the evanescent, narrow, factional views of those in power and the belief that no one has a patent on the 'truth' that underlay the First Amendment."); *Green* v. *FCC*, 447 F.2d 323, 328 (D.C. Cir. 1971); *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1113 ("Choices [as to what should be broadcast] have to be made and, assuming that the area is one of protected expression, the choices must be made by those whose mission it is to inform, not by those who must rule."). See generally Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191 (1964); Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965).

On the issue of whether defendants' conduct was a violation of the First Amendment, the court's decision fails to appreciate the basic principle that whether or not broadcaster action is considered state action, there is no First Amendment right of access to the broadcast medium. Nor is there a First Amendment right to be free from editorial control by broadcasters. This was the essential teaching of the Supreme Court in *CBS* v. *DNC*. While Congress in Section 315(a) of the Communications Act has barred the exercise of editorial control by broadcasters over the political advertisements involved here, this has no relevance to the question of whether the First Amendment has been violated. Indeed, the imposition of First Amendment damage liability for violation of Section 315(a)—and presumably in other situations where broadcaster editorial discretion might conceivably be restricted by statute or regulation—would substantially inhibit the broadcast editorial function, particularly in view of the substantial lack of clarity found in many of the requirements imposed by Congress and the Commission.[30]

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[30] These requirements are generally enforced only by Commission declaratory interpretation. A licensee who in good faith violates one of these requirements will not be subjected to monetary forfeiture or other sanctions, unless he clearly should have known of the requirement. See, *e.g.*, *Evening News Ass'n*, 49 F.C.C.2d 380 (1974). It is unlikely that a single violation would be sufficient to lead to a license revocation.

I. THE COURT BELOW ERRED IN HOLDING THAT BROADCASTER EDITORIAL ACTIVITY IS THE EQUIVALENT OF STATE ACTION.

In denying defendants' motion for summary judgment, the court below held that defendants' action in reviewing and editing the candidates' advertisements prior to broadcast was state action, and hence subject to the constraints of the First Amendment. As we show below, that conclusion is contrary to virtually all of the decided cases, seriously misinterprets the state action doctrine, and fails to appreciate the First Amendment interests of broadcasters and their fundamental separateness from government.

A. Recent Supreme Court Decisions Interpreting the State Action Doctrine Make It Clear That Broadcaster Action Is Not State Action

It is a basic principle of constitutional law that the Bill of Rights restricts governmental, not private action. The Bill of Rights is a statement of a theory of limited government. Its restrictions are imposed because of the unique power of the state and federal governments to influence and control the lives of the public, and are based on the premise that the prestige of governmental authority requires that governmental action conform to concepts of fundamental fairness.[31] No matter how wrongful or offensive the conduct, absent a finding of governmental action, there can be no violation of those constitutional restrictions imposed on the government.[32]

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[31] See generally, H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA (1971); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

[32] *See Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); see also *Shelly* v. *Kraemer*, 334 U.S. 1 (1948); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

As the Supreme Court has stated: "It is . . . a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976).

The state action doctrine has developed to assure that when the government becomes "insinuated" in the activities of ostensibly private institutions, those private institutions, too, must bear the constitutional responsibilities of public authority.[33] Similarly, the state action doctrine seeks to make certain that the government not avoid its constitutional duties by having private entities do those things which the government itself would be prohibited from accomplishing directly.[34]

Inevitably, there have been pressures to expand the state action doctrine beyond the scope of its rationale, to use it simply as a means of restricting the power of private institutions to take the action they deem appropriate as a matter of private choice. Hospitals, universities, businesses and, as here, the communications media, have all come under constitutional attack when the policies they have adopted do not satisfy the expectations of other private parties. But the courts generally—and this Court especially—have resisted such pressures to expand the state action doctrine and to extend constitutional restrictions to essentially private organizations, at least in those instances when racial discrimination is not at issue.[35]

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[33] See *Burton* v. *Wilmington Parking Authority*, *supra*.

[34] See, *e.g.*, *Holodnak* v. *Avco Corp.*, 514 F.2d 285, 292 n.7 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

[34] See, *e.g.*, *New York City Jaycees, Inc.* v. *United States Jaycees, Inc.*, 512 F.2d 856 (2d Cir. 1975); *Wahba* v. *New York University*, 492 F.2d 96 (2d Cir. 1972), *cert. denied*, 419 U.S. 874 (1974); *Greenya* v. *George Washington University*, 512 F.2d 556 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 995 (1976).

Underlying these decisions has been a growing recognition of the need to permit a range of private choice free from judicial scrutiny if the sense of freedom and liberty—upon which the constitutional system is founded —is to be maintained. As Judge Friendly has observed,

> "[i]t is the very possibility of doing something different from that which the government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law, which stimulates much private [human activity.]" [36]

Similarly, this Court has recognized "the value of preserving a private sector free from the constitutional requirements applicable to government institutions." [37]

Limitation of the state action doctrine is particularly important when activities that are themselves afforded constitutional protection are challenged.[38] In those circumstances, restricting judicial scrutiny of private decisions becomes even more significant. This is crucially necessary in the case of broadcasting. While Congress and the Commission have certain powers to regulate the broadcast medium, broadcasters remain vital

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[36] H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA 30 (1971).

[37] *Wahba* v. *New York University, supra,* 492 F.2d at 102.

[38] As Justice Stewart said in his concurring opinion in *CBS* v. *DNC,* 412 U.S. at 134:

> "The problem before us, however, is too complex to admit of solution by simply analogizing to cases in very different areas. For we deal here with the electronic press, that is itself protected from Government by the First Amendment."

Justice Stewart also warned against:

> "woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or 'company towns,' " *Id.*

organs of the free press, distinct from the government. The primary purpose of the First Amendment is to protect speech and press from governmental intrusion. It would be entirely anomalous if broadcasters, who are themselves protected by the guarantee of a free press, were held subject directly to the restraints of the First Amendment. The result would be that every editorial decision of broadcast licensees would raise an issue of First Amendment dimension, and the courts and the Commission could intrude deeply into the functions of broadcast journalists.

Certainly, as we now show, none of the traditional indicia of state action is found in the activity of broadcasters.

1. *The Existence of Government Regulation Does Not Transform Broadcaster Action Into State Action.*

It is clear—and the court below did not dispute [39]—that the existence of governmental licensing and general regulation alone is not a sufficient basis for a finding of state action.[40] Although such a theory has been repeatedly urged on the Supreme Court,[41] it has never been adopted. Indeed, in two recent cases, the Supreme Court has specifically held that the existence of licensing or general governmental regulation does not convert private action into state action. In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the plaintiff urged

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[39] 424 F.Supp. at 1327 (J.A. 170).

[40] See generally Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

[41] See *Garner* v. *Louisiana*, 368 U.S. 157, 181-85 (1961) (Douglas, J., concurring); *Lombard* v. *Louisiana*, 373 U.S. 267, 281-83 (1963) (Douglas, Jr., concurring); *Reitman* v. *Mulkey*, 387 U.S. 369, 384-87 (1967) (Douglas, J., concurring.)

that a private club's racial discrimination in membership requirements should be treated as state action because the club held a liquor license and was otherwise regulated. The Court rejected this contention, noting that it has never held that discrimination by an otherwise private entity was state action merely because the entity was subject in some degree to state regulation or could operate only pursuant to a government license, for "such a holding would utterly emasculate the distinction between private as distinguished from state conduct." *Id.* at 173.

More recently, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), the Court rejected a claim by a customer that the action of a public utility in terminating service was state action and that the utility was subject to due process requirements. The Court held that the action of the utility was not state action, even though the utility was heavily regulated by the government, stating:

> "The mere fact that a business is subject to regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952)." *Id.*

Instead, the Court emphasized that in order for a regulated entity to be subject to constitutional limitations, there must be a direct nexus between the regulation and the specific challenged activity.[42] The state must in some way have ordered or required the action alleged

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[42] 419 U.S. at 394. The Court emphasized that even in a monopoly situation, there must still be the direct relationship between the regulation and the challenged action. *Id.*

to be a constitutional violation; mere approval of, or tacit acquiescence in, the activity is not enough.[43] *Id.* at 356-57.

Obviously, federal regulation has in no way required the challenged activity here—the review and editing of the political advertisements. To the contrary, such activity is expressly prohibited by the Comunications Act, and the Commission acted to penalize the licensee for the statutory violation. For this reason, it should be particularly clear that the governmental regulation in this case does not convert private broadcaster action into state action.

2. *Broadcaster Action Is Not The Performance Of A "Public Function."*

The court below apparently did not find that federal regulation itself converted broadcaster action into state action; rather, it relied on the idea that "by giving Western monopoly control over the local airways, federal regulation has invested Western with the capacity to obstruct free speech in local elections."[44] However, as the Supreme Court's decision in *Jackson* v. *Metropolitan Edison Co.*, *supra*, makes clear, the mere fact that the government has conferred monopoly, or partial monopoly, status upon a private entity does not convert the action of the private organization into state action. The Court said:

> "[A]ssuming that [petitioners are able to show that the public utility is a monopoly], this fact is not determinative in considering whether Metropolitan's

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[43] Thus, the decision of the Supreme Court in *Pollak* v. *Public Utilities Comm'n*, 343 U.S. 451 (1952) is inapposite. In *Pollak*, the Court rested its finding of state action on the specific governmental approval of the policy in question. See also *Jackson* v. *Metropolitan Edison*, *supra*, 419 U.S. at 354-57.

[44] 414 F.Supp. at 1327 (J.A. 170).

> termination of service to petitioner was 'state action' for purposes of the Fourteenth Amendment." [45]

As the Court in *Jackson* also made clear, even where the private organization enjoys a monopoly, state action is not present unless the private organization is performing a government function.[46]

In a number of cases, some relied on by the court below, actions by private persons have been deemed state action when it was clear that the private party was seeking to exercise a plainly recognizable governmental function. In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), for example, the Supreme Court held that a private company which had established, owned and maintained a "company town," and which functioned like a government, could not prohibit a Jehovah's Witness from distributing religious literature in the community. And, in *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court was confronted with racial discrimination in a private political primary. The Court held that the organization which had conducted the primary elections was subject to the limitations of the Fourteenth Amendment, and could not engage in racially discriminatory exclusionary practices. As Justice Black stated in his concurring opinion, the county political organization primary was "the integral part, indeed the only effective part of the election process that determines who shall rule and govern in the county." [47]

In *Evans* v. *Newton*, 382 U.S. 296, 299 (1966), the Supreme Court characterized the decisions in *Marsh* and *Terry* as holding only that:

> "[W]hen private individuals or groups are endowed by the State with powers or functions governmental

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[45] 419 U.S. at 351-52.

[46] *Id.* at 352-53.

[47] 345 U.S. at 469.

> in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

The test—whether the private entity is exercising governmental powers or functions in place of the state—was again emphasized by the Supreme Court in *Lloyd Corporation* v. *Tanner*, 407 U.S. 551, 569 (1972),[48] where the Court specifically distinguished the *Marsh* holding because there the company defendant "was performing the full spectrum of municipal powers and stood in the shoes of the State." 407 U.S. at 569. The important inquiry, according to the Court, was whether the private entity—in that case a shopping center—was exercising governmental powers or functions. The Court held that it was not.

Finally, in *Jackson* v. *Metropolitan Edison Co.*, *supra*, the Court emphasized that for state action to be found on the part of the regulated utility, it would have to exercise a function "traditionally associated" with the government:

> "If we were dealing with the exercise by Metropolitan of some power which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. . . . Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the

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[48] *Lloyd Corp.* limited the scope of the Court's earlier decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), in which the Court had struck down, as illegal state action, the private prohibition of labor picketing on the premises of an open shopping center, relying principally upon *Marsh* and *Terry*. More recently, the Court has recognized that the rationale of *Lloyd Corp.* compelled it to expressly overrule *Logan Valley*. *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

> doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actors in all their actions. We decline this invitation . . . ." 419 U.S. at 352-53.

Thus, the "public function" doctrine has a limited, narrow application to those situations where private entities are exercising functions clearly and peculiarly reserved to the government. The public function theory applies only to those activities which are "so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency." *Powe* v. *Miles*, 407 F.2d 73, 80 (2d Cir. 1968).[49]

Of course, the operation of the broadcast media is not one "traditionally associated with sovereignty." From the inception of broadcasting regulation, there has existed a recognition that the journalistic role is a private, not a governmental function. In adopting the Communications Act, Congress emphasized its determination to limit the role of the government in regulating broadcasting. The Supreme Court, recognizing this, has stated:

> "[W]ith the advent of radio a half century ago, Congress was faced with a fundamental choice between total Government ownership and control of the medium—the choice of most other countries—or some other alternative. Long before the impact and potential of the medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enter-

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[49] See also *New York City Jaycees, Inc.* v. *The United States Jaycees, Inc., supra*, 512 F.2d at 859-60; *Wahba* v. *New York University, supra*, 492 F.2d at 102.

> prise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role." [50]

Specifically, in Section 326 of the Communications Act, Congress made it clear that the federal government is barred from the role of an editorial decision-maker.[51]

Quite evidently, then, a broadcast station is not the "functional equivalent" of a company town or governmental entity. If anything, it is the "functional equivalent" of a daily newspaper, for it performs the same informational and journalistic role. This functional equivalency to newspapers clearly negates a finding of state action. The cases have uniformly rejected the notion that private newspapers—which are plainly public forums suitable for the communication of ideas—are the "state" for purposes of the application of the First Amendment. Rather, the courts have consistently concluded that, despite the valuable communications functions which they perform, and despite the many aspects of their activities that are regulated or supported by the state, private newspapers are not the equivalent of the government and are under no affirmative obligation to publish materials offered to them.[52] The courts have recognized that the crucial function of the press as a critic of the state can be performed only when it is independent of the state. Thus, the conclusion that broadcasting is a suitable and vital means of communicating ideas and informing the public does not support a finding of state

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[50] *CBS* v. *DNC*, 412 U.S. at 116.

[51] 47 U.S.C. § 326 (1970).

[52] See, *e.g.*, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Associates & Aldrich Co.* v. *Times Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board, Amalgamated Clothing Workers of America* v. *Chicago Tribune Co.*, 425 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971).

action. To the contrary, it emphasizes the need to keep broadcasting separate from government for purposes of the First Amendment.[53]

B. Finding That Broadcaster Action Is State Action Would Subject Broadcasters to Improper Governmental Scrutiny.

The separateness of broadcasters from government would be substantially undermined by holding that broadcaster action is the equivalent of state action. A decision to that effect would permit any person disagreeing with a broadcaster's editorial or programming decision to go into court and seek judicial review of that decision, arguing that the broadcaster's judgment does not conform with the requirements of the First Amendment. The result would be to inject a degree of oversight into the very heart of broadcast decisionmaking.[54] Such a finding raises the risk that such editorial decisions will be found to be constitutionally improper simply because a court believes that a particular choice is somehow "wrong." Obviously, there is the potential that such a holding would substantially chill the exercise of editorial choice, since broadcasters would have to fear that a choice which might offend someone would be subject to judicial review.

It would be difficult to imagine a course more at odds with the First Amendment. Governmental dictation of what issues, views and spokesmen are to be heard is the heart of censorship and the antithesis of a free broad-

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[53] Nor has the government "so far insinuated itself into a position of interdependence" with the conduct of broadcast activity "that it must be recognized as a joint participant in the challenged activity . . . ." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). Surely, it would not comport with common sense to attribute broadcaster decisions to governmental authority. See generally Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

[54] See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974).

cast press. Indeed, this is precisely what the First Amendment forbids in order to preserve the "higher value" of free expression and debate. If the First Amendment stands for anything, it represents a commitment to the proposition that the interest of an informed public will better be served by having individual journalists, rather than the government—or the courts—select material to be presented in the press.

Numerous cases have emphasized the value of minimizing governmental scrutiny over broadcaster editorial choice, even assuming that some regulation is justified. In *National Broadcasting Company Inc.* v. *FCC*,[55] the District of Columbia Circuit determined that the Commission had impermissibly ruled that a broadcast violated the Commission's fairness doctrine.[56] There the court expressed the controlling principle that:

> "The First Amendment is broadly staked on the view that our country and our people—rich in diversity of strains and viewpoints—is best served by widest latitude to the press, as broadening input and outlook, through a robust and uninhibited debate that is subject to only the minimum controls necessary to the vitality of our democratic society." *Id.* at 1132.

Although granting such discretion to licensees leaves some potential for abuse, the court concluded that, in general,

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[55] 516 F.2d 1101 (D.C. Cir. 1974), *vacated on other grounds*, 516 F.2d 1180 (1975), *cert. denied*, 424 U.S. 910 (1976). Despite having been vacated, *NBC* is often cited as the law of the Circuit. See, *e.g.*, *Straus Communications Inc.*, v. *FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

[56] The fairness doctrine requires broadcast licensees to provide broadcast coverage of controversial issues of public importance, and requires that when a licensee presents an opinion on such an issue, it afford time for the presentation of opposing viewpoints by responsible spokesmen. See *e.g.*, *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act* (*Fairness Report*), 48 F.C.C.2d 1 (1974); *Applicability of the Fairness Doctrine to Broadcast Licensees*, 29 Fed. Reg. 10415 (1964).

"the evils of communications controlled by a nerve center of government loom larger than the evils of editorial abuse by multiple licensees who are not only governed by the standards of their profession but aware that their interest lies in long term confidence." *Id.* at 1133.

In *Accuracy in Media* v. *FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976), the court was confronted with the issue of whether § 396(g)(1)(A) of the Public Broadcasting Act could constitutionally require noncommercial broadcast licensees to meet specified standards of balance and objectivity with respect to individual programs. Fearful of the system of governmental oversight that would be created, the court interpreted the statute to avoid the constitutional problem, stating that "[w]e will not presume that Congress meant to thrust upon us the substantial constitutional questions such a result would raise." *Id.* at 297.

Similarly, in *Straus Communications, Inc.* v. *FCC*, 530 F.2d 1101 (D.C. Cir. 1976), the court reversed a Commission determination that a licensee was required to provide reply time in response to an alleged personal attack.[57] Recognizing the need to protect the licensee's First Amendment interests, the court held that the reasons given by the licensee for its decision not to provide time were entitled to great deference in determining whether the rule had been violated. *Id.* at 1110. Otherwise, the government would be overly involved in inquiry into journalistic motivation and editorial choice.[58]

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[57] The Commission's Personal Attack Rule states that when a licensee attacks the "honesty, character, integrity or like personal qualities of a person or group during the presentation of views on a controversial issue of public importance," he must transmit a copy of the "attack" to the person or group in question, and offer reasonable opportunity for such group or person to respond. 47 C.F.R. §§ 73.123(a), 73.300(a), 73.598(a), 73.679(a) (1975).

[58] See also, *e.g.*, *Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971).

In *Pacifica Foundation* v. *FCC*, No. 75-1391, 45 U.S.L.W. 2429 (D.C. Cir., March 16, 1977), the court ruled that the Commission could not order licensees to refrain from broadcasting certain "patently offensive," but non-obscene, words during times when children might be expected to be in the audience, noting that such an order was unduly vague and overbroad, and therefore an exercise of improper censorship on the part of the Commission.

In *CBS* v. *DNC*, the Supreme Court held that neither the First Amendment nor the Communications Act prohibits broadcast licensees from refusing to sell advertising time to individuals or groups wishing to speak out on public issues. Writing for the Court, Chief Justice Burger emphasized that, although broadcasting presents a unique context in which some limited governmental regulation is at times necessary and constitutionally proper, the need for such regulation must always be balanced against the First Amendment interests of broadcasters.[59] Noting that in Section 326 of the Act Congress had prohibited the Commission from engaging in censorship or interfering with the right of free speech, the Court stated that "from these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." [60]

The Court objected particularly to the stultifying effect inherent in any system of government supervision of the proposed right of access system, for that would risk "an enlargement of Government control over the content of broadcast discussion of public issues." [61]

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[59] 412 U.S. at 102.

[60] *Id.* at 110.

[61] *Id.* at 126.

Since the Court concluded that as a substantive matter, broadcasters were not prohibited by the First Amendment from refusing to sell editorial advertising time, it was unnecessary for it to reach the question of whether such broadcaster action was state action.[62] But in a section of his opinion speaking for a plurality of the Court, Chief Justice Burger observed that the same reasons which led to the rejection of the proposed constitutional right of access apply equally to the contention that broadcaster action is state action. Such a finding would require that every editorial choice that broadcasters make be tested by the courts to see if it is consistent with the First Amendment—a constitutional provision that is designed to assure that the state stay out of the business of editorial decisionmaking. As the plurality opinion stated:

> "[i]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest."[63]

Justice Stewart in a concurring opinion emphasized that "to hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First

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[62] *Id.* at 121.

[63] *Id.*

Amendment rights." [64] This reasoning is equally applicable to the present case. It counsels strongly against the sort of judicial scrutiny into broadcaster editorial practices that a finding of state action would authorize. Such scrutiny limits, rather than protects, the editorial freedom demanded by the First Amendment.

C. Other Courts Have Held That Broadcaster Action Is Not State Action, Since Converting Broadcaster Action Into State Action Would Be Inconsistent With the Journalistic Function of the Broadcast Medium.

Not surprisingly, with the exception of the decision of a divided Court of Appeals for the District of Columbia Circuit in *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (1971),[65] which was subsequently reversed by the Supreme Court in *CBS* v. *DNC*, it has generally been accepted that broadcasters, as well as

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[64] *Id.* at 139. Justice Stewart stated further that:

> "[Broadcasters] would be obligated to grant the demands of all citizens to be heard over the air, subject to reasonable regulations, as to 'time, place, and manner' . . . . If, as the dissent today have it, the proper analogy is to public forums—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers. For this is precisely the status of Government with respect to public forums—a status mandated by the First Amendment." *Id.* at 139-40.

Indeed, the idea that broadcasters are common carriers was explicitly rejected by Congress. See 47 U.S.C. § 153(h) (1970).

[65] In *BEM*, the court found that broadcasters' decision not to sell advertising time to persons wishing to make statements on controversial issues of public importance was state action relying on three factors—the regulation of broadcasters by the Commission, the Commission's specific acquiesence in the refusal of broadcasters to sell such time, and the "suitability" of the broadcast medium for the communication of ideas.

other informational media, are not subject to the limitations which the First Amendment imposes upon the government.[66]

The First and Third Circuits, and three United States District Courts have specifically held that action by broadcasters is not state action.[67] In *McIntire* v. *William Penn Broadcasting Co.*, 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the Third Circuit rejected a First Amendment claim by a religious organization seeking to compel a radio station to broadcast its programs, finding that action by broadcasters was not the equivalent of action by the state.[68] "[T]his Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as defendant here." *Id.* at 501. The First Circuit reached an identical result in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950).

In *Smothers* v. *Columbia Broadcasting System, Inc.*, 351 F. Supp. 622 (C.D. Cal. 1972), the court specifically

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[66] Contrary to the suggestion of the court below, the district court in the recent decision in *Writers Guild West, Inc.* v. *FCC*, No. CV 75-3641-F (C.D. Cal., Nov. 4, 1976) did not hold that broadcaster action is state action *per se*. Rather, it found state action because it believed that broadcasters' decision to adopt the so-called family viewing policy was based on pressure to do so generated by the Commission. *Id.* at 135-141. The court specifically refused to reach the question of whether state action would be present absent such governmental pressure on the particular programming choice. *Id.* at 211 n.119. The *Writer's Guild* decision is presently on appeal to the Ninth Circuit. Nos. 77-1058, 1059, 1060, 1061, 1103, docketed March 15, 1977.

[67] This view, as we have shown, was also shared by three Justices of the Supreme Court in *CBS* v. *DNC*. Four Justices found it unnecessary to reach that question in view of their disposition of the case.

[68] The Third Circuit reaffirmed *McIntire* in *Avins* v. *Rutgers University*, 385 F.2d 151, 153 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

held that broadcaster action in "censoring" or requiring deletions in programs was not governmental action. Plaintiffs had alleged that their First Amendment rights had been violated by CBS' deletions "from the taped Smothers Brothers shows of material which CBS believed to be objectionable as not fit for 'prime time entertainment' in pursuance of CBS' general practice of review and editing of shows." *Id.* at 623. The court found, however, that CBS' conduct did not amount to state action, and hence that there was no cause of action against CBS for violation of the First Amendment. The fact that broadcasters were subject to pervasive state regulation did not make broadcaster action state action.

So, too, in *Post* v. *Payton*, 323 F. Supp. 799 (E.D. N.Y. 1971), radio station employees and listeners claimed that a university violated their First Amendment rights by closing the university-owned radio stations for broadcasting obscenities. The court, rejecting the argument that broadcasters were agents or functionaries of the government, held that broadcaster action was not state action.

> ". . . To hold that the licensing by the Federal Government of a broadcast frequency endows the recipient with the quality of an agency of the Federal Government would be an unreasonable interpretation of governmental action." 323 F. Supp. 804.

The same conclusion was reached in *Moro* v. *Telemundo Inc.*, 387 F. Supp. 920 (D.P.R. 1974).[69]

The court below did not discuss, or even cite, these contrary decisions. However, the court did suggest that if Western Connecticut did not have a "monopoly" of radio stations in the Stamford market, or if the pro-

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[69] In *Moro*, the court held that the First Amendment rights of a prospective guest on a television interview program were not violated when the station cancelled the broadcast.

gramming were of a different character or addressed to a different audience, or if the First Amendment rights of broadcasters were also involved, a different situation might be presented.[70] None of the cases finding that broadcaster action is not state action considered such distinctions to be relevant.[71] Moreover, the reasoning of the court below does not support its purported limitation. The court based its finding of state action on the fact that governmental licensing gave the broadcaster unique authority to control the dissemination of public expression, thereby making broadcaster action the performance of a public function. That rationale applies whether or not the other factors cited by the court are present.

Moreover, the factors cited by the court have no relevance to the state action issue. For example, as we have seen, the Supreme Court in *Jackson* explicitly rejected the contention that monopoly status itself turns a regulated entity into the government for the purpose of constitutional analysis.[72] It would plainly be a constitutional anomaly if the number of broadcast stations were the controlling factor in determining the presence of state action, leaving stations in a two-station market free of constitutional restraints, while subjecting stations in a single-station market to constitutional limitations.[73]

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[70] 424 F.Supp. at 1328 n.3. (J.A. ——).

[71] In *McIntire, supra,* the court found no state action despite an allegation—not directly controverted—that the licensee had obtained near monopoly control over local stations so that alternative outlets were not available for the expression of plaintiff's views. 151 F.2d at 600.

[72] In fact, Western Connecticut is not the only broadcaster serving the Stamford area. See note 18 *supra.*

[73] The character of the programming or the audience at which it is directed makes no difference for state action purposes. It is difficult to see how a court could base a finding of state action—or a finding of no state action—on the type of programming or audience involved. Indeed, for a court to begin drawing state action

We note also that, in stating a willingness to take into account these various factors, the court below indicated that it believed the judgment of whether broadcaster action is state action should turn on a case-by-case analysis of the particular facts presented. However, such analysis has the undesirable consequence of leaving broadcasters totally uncertain of whether their actions are to be tested by constitutional standards. This clearly frustrates the desire to afford broadcasters a sense of freedom in the conduct of their editorial activities.

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lines on the basis of program content would be fundamentally contrary to the First Amendment. See *Police Dept.* v. *Mosley*, 408 U.S. 92 (1972); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975).

The court below appeared to suggest that a different result might obtain where "the free speech rights of the broadcaster are also involved." What the court apparently meant by this was that, under the statute, Congress had constitutionally restricted broadcasters' rights to edit political advertisements. See pp. 37-38 *infra*. However, the court was in error in suggesting that Section 315 necessarily eliminated any broadcaster First Amendment interests in editing the political advertisements. As the Supreme Court made clear in *CBS* v. *DNC*, there is a general First Amendment interest in permitting broadcasters to exercise editorial control over the material they present. Indeed, that there is such an interest in broadcasters in areas subject to regulation has been recognized by the courts in interpreting Section 315 and other Commission restrictions on broadcaster editorial discretion. See, *e.g.*, *Straus* v. *FCC*, *supra*; *National Broadcasting Co.* v. *FCC*, *supra*; *Accuracy in Media*, *supra*; *Chisolm* v. *FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, ---- U.S. —— (October 12, 1976). While this interest may at times be overridden by governmental regulation—and indeed in *CBS* the Court explicitly acknowledged the possibility that the Commission could enforce a right of access—the importance of preserving editorial control generally remains. This is true even with regard to broadcast coverage of political candidates, for Section 315 restricts such control only in a narrow and limited area. Moreover, as noted, other cases have found no state action in circumstances involving regulated institutions similar to those here, even where no constitutional interest was established on the part of the challenged entity. See, *e.g.*, *Jackson* v. *Metropolitan Edison*, *supra*.

II. WHETHER OR NOT EDITING POLITICAL ADVERTISEMENTS IS STATE ACTION, IT DOES NOT VIOLATE THE FIRST AMENDMENT, SINCE THERE IS NO CONSTITUTIONAL RIGHT TO PRESENT MATERIAL FREE OF BROADCASTER EDITORIAL CONTROL.

Even if the plaintiffs in this case had established that the broadcaster action involved was state action, the question remains whether that action was in violation of the First Amendment. A finding of state action requires a careful inquiry into what the Constitution requires in a particular context. Thus, for example, where racial discrimination is at issue, a finding of state action demands that normally private entities be subject to exactly the same limitations that the equal protection clause imposes on government.[74] But a different situation prevails when the First Amendment is involved, for then, the Constitution recognizes a special interest in those who exercise freedom of expression, even if their action is considered governmental action.[75]

The court below held that if the broadcaster action in this case was state action, it necessarily violated the First Amendment. We believe, however, that such a conclusion is unfounded, and indeed directly contrary to the decision of the Supreme Court in *CBS* v. *DNC*.

Plaintiffs here, relying solely on the First Amendment, demand redress for effectively being denied a right of

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[74] *See, e.g., Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969).

[75] See *CBS* v. *DNC*. *See generally*, H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA, 26-27 (1971); King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1075-76 (1971).

access to the broadcast media.[76] *CBS* v. *DNC* establishes, however, that there is no First Amendment right of access to the broadcast media, and that no violation of the First Amendment occurs when a broadcaster exercises editorial discretion as to whether to broadcast material offered for presentation.[77]

In *CBS*, the Democratic National Committee ("DNC") and the Business Executives' Move for Vietnam Peace ("BEM") challenged the right of broadcasters to institute and carry out policies against selling advertising time to persons and groups wishing to make editorial statements on controversial issues of public importance—including certain policies against selling time to political groups for some purposes. DNC and BEM contended that such policies violated both the Communications Act and the First Amendment. The Commission denied their First Amendment claims.[78] In *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (1971), a divided panel of the District of Columbia Circuit reversed the Commission's decision. It held that the broadcasters'

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[76] Plaintiffs, of course, had a statutory right to "equal opportunities" based on Section 315(a), but there is no private right of action to enforce Section 315(a). See *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83 (7th Cir. 1962); *Gordon* v. *National Broadcasting Co.*, 287 F. Supp. 452 (S.D.N.Y. 1968).

[77] In *Avins* v. *Rutgers University, supra,* the Third Circuit concluded that the editors of a law review at a state-run law school had the right to exercise First Amendment editorial control over the publication even though it was a state "institution," holding that a rejected author had no constitutional right to demand that his article be printed. See also *McIntire* v. *William Penn Broadcasting Co., supra; Massachusetts Universalist Conv.* v. *Hildreth & Rogers Co., supra. Cf. Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

[78] In one minor respect the Commission recognized a non-constitutional obligation on the part of broadcasters to accept fund raising advertisements on behalf of political parties. *Democratic Nat'l Committee*, 25 F.C.C.2d 216, 228-30 (1970). In this respect the Commission viewed its decision as merely a slight extension of Section 315(a) *Id.* at 230.

action in adopting their policies was state action, and that the refusal to make time available for editorial advertising violated the First Amendment. The court ordered the Commission to implement a system of access for such editorial advertisements free of broadcaster editorial control.

The Supreme Court reversed, with only two Justices dissenting.[79] The full Court did not reach the state action issue. Rather, the Court dealt with the question of whether broadcasters are required to accept editorial advertisements by the First Amendment, assuming the existence of state action. The Court concluded that broadcasters are not required to accept such advertisements, rejecting the proposed constitutional right of access. It held that regardless of the degree of governmental licensing and regulation of the broadcasting industry—and even if that licensing and regulation might lead to a conclusion that broadcaster action is state action—the First Amendment does not impose liability on broadcasters for making editorial choices about which programming to present. The rationale of *CBS* v. *DNC*, then, is that the exercise of editorial choice is not a violation of the First Amendment.[80]

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[79] In addition to Chief Justice Burger, Justices Rehnquist, White, Blackmun, and Powell joined Parts I, II and IV of the Court's opinion. Part III of the Chief Justice's opinion, which is not an opinion of the Court, found that broadcaster action was not state action, and was joined by Justices Rehnquist and Stewart. 412 U.S. at 114-121. Justices Blackmun and Powell held that regardless of whether the broadcaster action was state action, no violation of the First Amendment had occurred; therefore, it was unnecessary to reach the former issue. *Id.* at 147-48. Justice White suggested that even though the broadcaster action may have been state action, there was no First Amendment violation. *Id.* at 146-47. Justice Douglas stated that broadcasters should be treated as identical to newspapers for First Amendment purposes, and that their editorial decisions should be given complete constitutional protection. *Id.* at 148-70. Only Justices Brennan and Marshall voted to affirm the decision of the Court of Appeals. *Id.* at 170-204.

[80] In other cases, this same principle has been recognized. In *Mark* v. *FCC*, 468 F.2d 266 (1st Cir. 1972), the First Circuit

From a First Amendment standpoint, the editorial control exercised by defendants here was no different from that at issue in *CBS* v. *DNC*, or that commonly exercised by broadcasters in their day-to-day programming.

While *CBS* v. *DNC* therefore appears to be dispositive of this case, the court below, without discussion of the *CBS* case, seems to have concluded that the imposition of a statutory right to "equal opportunities" and a duty not to censor material broadcast pursuant to Section 315 (a) somehow converted constitutionally proper activity into unconstitutional activity. Certainly, there is no support for such a view.

If there were a suggestion that the Supreme Court's decision in *CBS* v. *DNC* does not apply when the government could constitutionally restrict the broadcaster editorial function, that position was explicitly rejected in *CBS* v. *DNC* itself. There, the Court stated that the

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held that whether or not broadcaster action is state action, the First Amendment does not bar a broadcaster from prohibiting an author promoting astrology from appearing on a television talk show, in accordance with an editorial standard established by the National Association of Broadcasters. In *McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir., October 22, 1976), request for injunction pending certiorari denied (October 22, 1976), *cert. denied*, 45 U.S. L.W. 3664 (April 4, 1977), the court held that a minority candidate for the presidency in the 1976 campaign had neither a constitutional nor a statutory right to participate in the televised debates sponsored by the League of Women Voters. In *Writer's Guild, West Inc.* v. *FCC, supra*, the court concluded that the adoption by the networks of the so-called family viewing policy would not be contrary to the First Amendment if it had been made independent of government pressure. Slip. Op. at 116-17. And in *Accuracy in Media* v. *FCC, supra*, the court concluded that substantial First Amendment questions would be raised by imposing an obligation of balance and objectivity, again regardless of whether the activity of the Corporation for Public Broadcasting is deemed state action.

Commission might properly implement by regulation a system of access to the broadcast media,[81] suggesting that the Comission should be permitted to engage in a "continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees." Nonetheless, the Court held that the Constitution did not prohibit broadcasters from exercising editorial control over the advertisements offered to them, stating that "courts should not freeze [the] necessarily dynamic process [of Commission regulation] into a constitutional holding." [82]

If instead there were a suggestion that *CBS* v. *DNC* is not applicable when Congress or the Commission has in fact constitutionally acted to restrict broadcaster editing, this would lead to the anomalous result of making the existence of a constitutional right depend on action that was taken by Congress or the Commission without any intention that such a right be created.[83] Indeed, creating a constitutional right of action would undermine the statutory or administrative scheme.[84] The effect of creating First Amendment damage liability for violation of such statutory or administrative requirements would be substantially to chill the exercise of the

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[81] 412 U.S. at 132.

[82] *Id.*

[83] Congressional and Commission regulation is, of course, not immutable. Thus, for example, Congress suspended Section 315 as to the presidential campaign of 1960, P.L. 86-677, 47 Stat. 554, 86th Cong., 2d Sess. (1960), and has under consideration a proposal to repeal Section 315 altogether. See S. 22, 95th Cong., 1st Sess. (introduced by Sen. Proxmire, January 10, 1977).

[84] As we have noted, Congress did not intend to establish a private right of action under Section 315(a). See *Daly* v. *Columbia Broadcasting System, Inc., supra; Gordon* v. *National Broadcasting Co., supra.* The court below has effectively circumvented this Congressional intent by apparently finding a constitutional right of action for damages under Section 315(a).

journalistic function, and limit the public's ability to view broadcast coverage based on unfettered editorial choice.

For example, in Section 315, Congress created a number of exemptions designed to permit broadcast coverage of newsworthy events unaffected by the threat of an "equal opportunities" obligation. Thus, exemptions were provided for bona fide newscasts, news interviews, and certain news documentaries, as well as on-the-spot coverage of bona fide news events.[85] These exemptions resulted from a recognition that where the "equal opportunities" provision applies, there may be a serious inhibitory effect on the broadcast press.[86]

In implementing those exemptions, the Commission has expressed its view that the broadcast of certain candidate press conferences and candidate debates are within the "bona fide news event" exemption in Section 315(a)(4).[87] Its rationale was that in enacting those exemptions, Congress wanted to encourage broadcast coverage of such newsworthy events. The public's interest in viewing such events would be frustrated if broadcasters refused to broadcast press conferences or debates for fear that they would thereafter be obligated to afford similar broadcast time to all competing candidates. In affirming the Commission's decision, the District of Columbia Circuit held that:

> "the basic purpose of the amendment, [to Section 315(a) was] '[To] enable what probably has become the most important medium of political information to give the news concerning political races to the greatest possible number of citizens, and to

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[85] 47 U.S.C. § 315(a)(1)-(4) (1970).

[86] *See Aspen Institute*, 55 F.C.C.2d 697, 698 (1975).

[87] *Id.*

make it possible to cover the political news to the fullest degree.' " [88]

The recent presidential debates between Gerald Ford and Jimmy Carter sponsored by the League of Women Voters were assured by a determination that the "equal opportunities" provision was inapplicable.[89]

We believe that a decision imposing First Amendment damage liability [90] for a violation of Section 315 would substantially undercut the willingness and ability of broadcasters to present political discussions in areas where there are questions as to the applicability of Section 315. As the Supreme Court has recently emphasized, statutes designed to augment the public's exposure to different ideas may have precisely the opposite effect. In *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), the Court held that a Florida statute granting a political candidate a right to equal space to reply to criticism by a newspaper violated the First Amendment for this very reason:

> "Faced with the penalities that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government enforced right of access inescapably 'dampens

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[88] *Chisholm* v. *FCC*, 538 F.2d 349, 356 (D.C. Cir. 1976), quoting, 105 CONG. REC. 14451 (1959) (remarks of Sen. Holland), *rehearing en banc denied* (May 13, 1976), *cert. denied*, —— U.S. —— (October 12, 1976).

[89] The propriety under Section 315(a) of the broadcast of these debates was affirmed in *American Indep. Party*, 38 Pike & Fisher R.R.2d 923, *aff'd sub nom. McCarthy* v. *FCC*, No. 76-1915 (D.C. Cir., October 22, 1976), request for injunction pending certiorari denied, No. A-321 (U.S., October 22, 1976).

[90] See generally *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

> the vigor and limits the variety of public debate.' *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 279 . . . ." 418 U.S. at 257 (Footnote omitted).

If the present decision were affirmed, broadcasters would have to fear substantial damage liability if they make a "wrong" editorial choice in the coverage of a political campaign and thereby violate Section 315(a). While the violation of Section 315(a) in this case was clear, the standards and exemptions established in Section 315 raise numerous questions of interpretation. Broadcasters can almost never be totally sure that they are conforming to the requirements of that Section. Although administrative sanctions for such a violation may be substantial—as they were in this case [91]—they are small compared to the potential damage liability a court could award a losing candidate.[92] Moreover, such administrative sanctions are normally not imposed if the broadcaster's judgment in this area is made in good faith.[93] Thus, the result of the decision below is that broadcasters might well choose to limit campaign broadcasts, rather than

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[91] The initial decision denying renewal to Western Connecticut pursuant to the comparative renewal hearing was based on numerous other factors. By itself, it is not likely that the violation of § 315(a) would have led to the loss of license.

[92] In *New York Times* v. *Sullivan*, *supra*, the Supreme Court stated that:

> "The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute . . . The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act . . . . Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 277.

[93] See note 30 *supra*.

risk the damage liability invited by the court's opinion. This, however, would be totally contrary to the First Amendment interest in the widest possible dissemination of ideas and information relating to political campaigns, and to the Congressional purpose in Section 315(a).[94]

The effect of the decision below, moreover, is not limited to situations involving violations of Section 315 (a), and the reasoning could extend at least to any situation where a court had found that the licensee had violated any provision of the Communications Act or Commission regulation or policy. Thus, for example, if a licensee violated Section 312(a)(7) of the Communications Act, requiring broadcasters to supply "reasonable access" to candidates for federal elective office,[95] the

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[94] In addition to inhibiting presentation of candidate discussion, we believe that the decision below seriously interferes with the statutory scheme in another way. Permitting a candidate whose rights under Section 315(a) have been violated to sue in court for damages under the First Amendment discourages use of Commission procedures for resolution of a Section 315(a) dispute in advance of the election. Under the present enforcement mechanism, a candidate who believes that his "equal opportunities" rights have been violated must complain to the station during the course of the campaign and then to the Commission, if he is to secure equal opportunities. See pp. 4-5 *supra*. The Commission is prepared to act quickly—often in a matter of hours—on any complaint under this section in order to ensure that material be broadcast in time to reach the public during the campaign, and the courts will review such Commission action on an expedited schedule. See *Use of Broadcast Facilities By Candidates for Public Office*, *supra*, at 864. (On the expedited nature of judicial review, see *McCarthy* v. *FCC*, *supra*.) If the candidate is given the option of waiting until the campaign is over to obtain some sort of relief, and is given the option of going into court to seek damages, the purpose of the provision—to provide relevant discussion during the campaign—would be frustrated. It is primarily for this reason that there is no private statutory right of action for violation of Section 315(a). See *Daly* v. *Columbia Broadcasting System, Inc.*, *supra*; *Gordon* v. *National Broadcasting Co.*, *supra*.

[95] 47 U.S.C. § 312(a)(7) (1970).

Commission's fairness doctrine,[96] the political editorializing rule[97] or the Commission's personal attack rules,[98] the licensee might also be found to have violated the First Amendment.[99] At the present time, certain of these Commission requirements have been sustained by the courts only because of their inherent generality, which leaves substantial room for the exercise of broadcaster editorial discretion.[100] The imposition of damage liability for violation of these requirements would, we believe, so severely inhibit the broadcasters' journalistic function that there would be a substantial question as to whether any of these Congressional or Commission restrictions on broadcast editing could continue to be imposed consistent with the First Amendment.

In short, the questions of statutory and constitutional responsibility are, and must be, totally distinct. The creation of one duty in no way suggests that its breach is at the same time a violation of the other independent source of law. *CBS* v. *DNC* establishes the basic journalistic nature of the broadcast medium and recognizes the

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[96] See note 56 *supra*.

[97] The political editorializing rule states, *inter alia*, that when a licensee endorses or opposes a candidate for public office he must notify all other candidates for that office, or the candidate opposed, and must afford reasonable opportunities for their responses. 47 C.F.R. §§ 73.123(c), 73.300(c), 73.598(c), 73.679(c) (1975).

[98] See note 57 *supra*.

[99] The court below would possibly award such relief even if the Commission had not determined that a broadcaster had violated a statutory requirement, Commission rule or policy, if the court, in its own interpretation, determined that a violation had occurred.

[100] See *Banzhaf* v. *FCC*, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); *National Broadcasting Co.* v. *FCC*, *supra*. *Cf. National Association of Independent Television Producers and Distributors* v. *FCC*, 516 F.2d 526, 539-40 (2d Cir. 1975).

interest of broadcasters in exercising editorial functions. Insofar as private parties claim a right under the First Amendment to override broadcaster editorial decisions, broadcasters stand in no different position from newspapers.[101] The fact that Congress in Section 315(a) chose to override broadcasters' editorial decisions in a narrow area does not change the basic editorial nature of the broadcast medium, or provide any basis for distinction from other journalistic media. Instead, *CBS* v. *DNC*, holding that there is no First Amendment right of access to the broadcast medium, governs here.[102]

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[101] See page 34 *supra*.

[102] We do not believe that the issue of whether damages can be recovered for violations of the First Amendment from private parties whose actions are found to be state action is before this Court on this interlocutory appeal. Nonetheless, we should note that the issue of whetner *Bivens* v. *Six Unknown Named Agents*, *supra*, extends to the First Amendment context has been expressly left open by this Court, as well as by the District of Columbia Circuit. *Holodnak* v. *Avco Corp.*, *supra*, 514 F.2d at 292; *Greenya* v. *George Washington University*, *supra*, 512 F.2d at 563 n.13. Other courts have split on the issue in cases involving the question of liability of governmental officials. *Compare, e.g., Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975); *Patmore* v. *Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975); *Butler* v. *United States*, 365 F. Supp. 1035 (D. Hawaii 1973), with *Archuletta* v. *Callaway*, 385 F. Supp. 384 (D. Colo. 1974); *Smothers* v. *Columbia Broadcasting System*, *supra*.

Certainly, the Fourth Amendment context in which *Bivens* arose differs greatly from that presented by the First Amendment. Whereas violations of the Fourth Amendment are similar to traditional torts such as trespass and invasion of privacy, First Amendment "censorship" has no corresponding analogy in the common law. The only cases *supra* finding First Amendment liability under *Bivens* compensated plaintiffs for injuries flowing from acts that were tortious actions ancillary to the constitutional violation. Moreover, at least in the broadcasting context, Congress has specifically provided an alternative statutory scheme under which broadcaster's responsibilities are enforced.

Similarly, the question of whether private parties can be held liable for damages under *Bivens* is an open question. As the District of Columbia Circuit has said, "even if it were decided that federal officials can be sued for damages for violations of the First

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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Amendment, such a decision would not automatically sweep within its ambit a case such as this one where private parties, and not federal officials, are allegedly acting under color of federal law or custom." *Greenya* v. *George Washington University*, *supra*, 512 F.2d at 563 n.13. See also *Fletcher* v. *Rhode Island Hosp. Trust Nat'l Bank*, 496 F.2d 927, 932 n.8 (1st Cir. 1974); *Kelley* v. *Action for Boston Community Dev., Inc.*, 419 F. Supp. 511, 526 (D. Mass. 1976). The *Bivens* rationale rested in large part on the unique power of federal officers to inflict harm on persons in ways that might not be effectively remedied under state law. That power is not present when private parties act, even if their action is considered that of the state because of the state action doctrine. In *Holodnak* v. *Avco Corp.*, *supra*, this Court held that exemplary damages could not be recovered against a private party under a *Bivens* theory, recognizing that Avco's constitutional obligations, unlike those of federal officials, had derived only from "the company it keeps." We believe that the same reasoning supports the principle that compensatory damages for constitutional violations should not be made available against private parties.

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